Supreme Court, U.S.
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92-963
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOSEPH R. MIX (a.k.a. ROBERT J. MIX)
Private E2, United States Army,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the inquiry prior to petitioner's proceeding *pro se* met the minimum standards to establish a knowing and intelligent waiver of counsel.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Joseph R. Mix (a.k.a. Robert J. Mix), respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 35 M.J. 283 (C.M.A. 1992) (Appendix A). The opinions of the Army Court of Military Review are reported at 29 M.J. 956 (A.C.M.R. 1990) (Appendix B), and 32 M.J. 974 (A.C.M.R. 1990) (Appendix C).

JURISDICTION

The decision of the Court of Military Appeals was rendered on September 24, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1992).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Rule 506(d) of the Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984 [hereinafter M.C.M. 1984] Pt. II, Exec. Order No. 12473, 49 Fed. Reg. 17,152 (1984), provides:

> **Rule 506. Accused's rights to counsel**
>
> (d) *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

STATEMENT OF THE CASE

On November 25, December 17 and 21, 1987; January 4, 19 and 20, and February 1-5, 1988, petitioner was tried at Fort Campbell, Kentucky, by a general court-martial composed of officer and enlisted members [hereinafter "the jury"].[1] Contrary to his pleas, he was convicted of conspiracy to commit larceny, three specifications of desertion, violation of a general regulation by

[1] Court-martial members are analogous to jurors.

failing to store arms and ammunition in the arms rooms, two specifications of escape from confinement, destruction of government property, destruction of personal property, larceny, arson, housebreaking and breaking restriction, in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] arts. 81, 85, 92, 95, 108, 109, 121, 126, 130 and 134, 10 U.S.C. §§ 881, 885, 892, 895, 908, 909, 921, 926, 930 and 934 (1982), respectively. The jury sentenced petitioner to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The sentence was approved by the convening authority and affirmed on appeal.

Initially, detailed military counsel and individually requested military counsel represented petitioner. After being advised of his rights to counsel by the military judge, petitioner expressed a desire to be represented by his uncle, an attorney in California.[2] When contacted by one of petitioner's military trial defense counsel, the uncle declined to represent petitioner since he did not practice criminal law. Furthermore, the military judge desired to expedite the court-martial, and the uncle could not be present because of a conflict with a previously scheduled civil court case.

The judge interpreted petitioner's dissatisfaction with military counsel to be a request to dismiss counsel and proceed *pro se*.[3] Petitioner did not specifically request to represent himself; rather, he hesitantly responded with "yes" and "no" answers to the questions posed to him by the military judge. The military judge advised peti-

[2] The exchange between petitioner and the military judge is substantially reiterated in the opinion of the Army Court of Military Review, (Appendix C). The actual exchanges are set forth in the record of trial at pages 54-64 and 254-266.

[3] M.C.M. 1984, Rule for Courts-Martial 506(d).

tioner of the right to represent himself but counseled him that if he did so, he would have to abide by "the rules of evidence and rules of law." The judge told petitioner that a lawyer would have a better understanding of the elements of the offenses and possible defenses and would be better able to identify weaknesses in the Government's case. He informed petitioner that he would have to comport with the rules pertaining to cross-examination and argument and that doing so would be difficult. Petitioner indicated that he did not want to represent himself and once again requested his uncle as counsel. Petitioner was permitted to personally contact his uncle and confirmed that his uncle would be unable to represent him. The judge then advised petitioner that he would be held to the standards of a lawyer and would have to ask questions like a lawyer and conduct his own *voir dire*. The judge emphasized the difficulty of self-representation. The judge asked petitioner if he desired another lawyer to sit with him at counsel table and advise him; petitioner agreed to the judge's suggestion. *However, the military judge did not discuss several very significant matters, such as petitioner's Fifth Amendment right to remain silent; the danger that petitioner might incriminate himself through statements and questioning during the course of his self-representation;*[4] *the elements of the charged offenses, even though petitioner stated that he did not know what the elements were; possible defenses; and the maximum punishment allowable upon conviction, even though petitioner was facing over 41 years of confinement.*[5]

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[4] Of critical importance was the perception of at least one jury member that some of petitioner's questions were incriminatory. *See* record of trial at pages 453, 454.

[5] Of all the admonitions required by court decisions, the requirement that an accused be fully advised of the possible extent of the

On appeal, the United States Army Court of Military Review directly disagreed with petitioner's position that this Court's decision in *Faretta v. California*, 422 U.S. 806 (1975), regarding waiver of right to counsel prior to proceeding *pro se*, requires use of the standards announced in *Von Moltke v. Gillies*, 332 U.S. 708 (1948). *United States v. Mix*, 32 M.J. 974, 980 (A.C.M.R. 1990).

The Court of Military Appeals indicated that the issue was whether there was a clear and unequivocal waiver to proceed *pro se*. It held that petitioner was competent to proceed *pro se* and that the military judge's inquiry and advice were sufficient to ensure a clear and unequivocal waiver. *United States v. Mix*, 35 M.J. 283, 285 (C.M.A. 1992). The Court of Military Appeals acknowledged that the United States Circuit Courts of Appeal are split concerning the extent of the inquiry necessary to ensure a knowing and intelligent waiver of the right to counsel before proceeding *pro se* since the *Faretta* decision. The Court of Military Appeals indicated that, in petitioner's case, it need not decide what type of inquiry is required because the judge advised appellant on several occasions of the benefits of a lawyer and the disadvantages of representing himself, especially as to the rules of evidence, cross-examination, arguments, and *voir dire*. Nonetheless, that court listed seventeen questions and stated that "future issues on this subject could be precluded or at least expedited on appeal if there was a more formal inquiry similar to that set out in the Appendix" of its opinion. *Id.* at 286.

REASONS FOR GRANTING THE WRIT

It is a settled principle that a defendant in a criminal matter has the right to conduct his own defense. *Faretta v. California*, *supra*. However, prior to exercising that

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punishment he faces is considered one of the most important. *See, e.g., United States v. Rylander*, 714 F.2d 996, 1005 (9th Cir.), *cert. denied*, 467 U.S. 1209 (1984).

right, the presiding judge must make an inquiry to ensure that the accused knowingly and intelligently waives the Sixth Amendment right to counsel:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, *in order to represent himself, the accused must "knowingly and intelligently" forego those relinquished benefits.* [emphasis added] *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct., at 1023. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S., at 269.

Id. at 835.

In *Patterson v. Illinois*, 487 U.S. 285 (1988), this Court reemphasized the need for extremely strict safeguards before allowing an accused to waive his right to counsel:

> . . . recognizing the enormous importance and role that an attorney plays at a criminal trial, *we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial.* [emphasis added] See *Faretta v. California*, 422 U.S. 806, 835-836 (1975); cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-724 (1948).

Id. at 298.

Patterson made it very clear that "a more searching or formal inquiry" is necessary before an accused will be allowed to waive the Sixth Amendment right to counsel and proceed *pro se* because "at trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subleties [*sic*] of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more." *Id.*

It is true that this Court has not defined the parameters of the *Faretta* inquiry. But this Court in *Von Moltke*, at 724, determined that "[t]o be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Despite this, many lower courts have addressed the issue with greatly varying results. For example, the Sixth Circuit Court of Appeals requires a direct, on-the-record, searching inquiry by the trial judge which advises the accused of the disadvantages and pitfalls of proceeding *pro se*. *See, e.g., United States v. McDowell*, 814 F.2d 245 (6th Cir.), *cert. denied*, 484 U.S. 980 (1987). The First Circuit Court of Appeals, however, only requires a general warning against proceeding *pro se*. *See, e.g., United States v. Campbell*, 874 F.2d 838 (1st Cir. 1989). Yet a third interpretation by the Fifth Circuit requires an inquiry which, while not as detailed as that required by the Sixth Circuit, nonetheless establishes that, with respect to the totality of the circumstances, a knowing and intelligent waiver of counsel was made. *See, e.g., Neal v. Texas*, 870 F.2d 312 (5th Cir. 1989).

The opinions of both the Army Court and the Court of Military Appeals add to the already existing conflict

among the Circuits and the confusion at the state court level concerning the proper application and interpretation of this Court's *Faretta* decision.

As elsewhere, confusion reigns within the military as to the extent of the inquiry necessary to ensure a knowing and intelligent waiver of counsel before proceeding *pro se*. Years ago, the Army Board of Review (now the Army Court of Review) decided the question by requiring a penetrating and comprehensive examination. It interpreted *Von Moltke*, *supra*, as requiring in every case that the judge advise the accused, prior to the approval of waiver of counsel, of the following: (1) the nature of the charges; (2) the statutory offenses included within them; (3) the range of allowable punishments thereunder; (4) the possible defenses to the charges and circumstances in mitigation thereof; and (5) all other facts essential to a broad understanding of the whole matter. *United States v. Howell*, 11 U.S.C.M.A. 712, 717, 29 C.M.R. 528, 533 (1960). In a 2-to-1 decision, however, the Court of Military Appeals reversed the Army Board of Review while commenting that the rule was comprehensive and excellent, but stated that the *Von Moltke* factors were mere guidelines. *Id.* at 717, 719 and 533, 535, respectively. Twenty-three years later, the United States Navy-Marine Court of Military Review, in the first published military decision on this issue since *Faretta*, also opined that the constitutionally minimum standards of inquiry necessary to establish a valid and effective waiver of representation were set out in *Von Moltke*. *United States v. Tanner*, 16 M.J. 930, 935 (N.M.C.M.R. 1983). The Navy-Marine Corps Court continued to follow and apply the factors adopted from *Von Moltke* as set forth in *Tanner*. *United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989). Despite the fact that the Army Court in petitioner's case took issue with the position of the Navy-Marine Corps Court regarding the *Von Moltke* factors as stated in *Tanner* and

Freeman (*Mix*, 32 M.J. at 980), the Court of Military Appeals did not discuss whether the Navy-Marine Corps Court's adoption of the *Von Moltke* factors was correct or not. *Mix*, 35 M.J. at 283. Instead of providing necessary guidance to the military Courts of Review, the Court of Military Appeals in petitioner's case evaded the issue, stating that it need not decide what type of inquiry is required to resolve petitioner's case. It suggested that similar issues could be precluded or settled in the future by implementing a more formalized inquiry consisting of seventeen questions which were listed in the Appendix. *Id.* at 286.

With its decision, the Court of Military Appeals abrogated its responsibility to petitioner and other military members by failing to take a firm stand as to the exact extent of the inquiry necessary to ensure a knowing and intelligent waiver of counsel. Different standards apply within the military. Marines and sailors presently are entitled to greater protection than soldiers regarding waiver of counsel at courts-martial. This does not provide equal treatment within the military and is fundamentally unfair. The Court of Military Appeals' decision in this case only further confused and postponed the answer to the question of what type of inquiry is constitutionally required before an individual, whether military or civilian, may proceed *pro se*.

The Court of Military Appeals' resolution of the issue is incorrect. The Court's decision basically endorses a minimum inquiry by stating that the inquiry in petitioner's case was more detailed than the few words exchanged between the judge and the accused in *United States v. Hafen*, 726 F.2d 21 (1st Cir.), *cert. denied*, 466 U.S. 962 (1984). *Mix*, 35 M.J. at 286. Five years ago this Court denied the petition for certiorari in *United States v. McDowell*, *supra*; Justice White, joined by Justice Brennan, dissented when the petition for certiorari was denied because a conflict among the lower

courts had emerged concerning the proper application and interpretation of this Court's *Faretta* decision. *Id.* This nation needs the guidance which only this Court can provide to clarify the extent of the inquiry required to ensure the knowing and intelligent waiver of the constitutional right to counsel prior to proceeding *pro se*. Such a decision would promote judicial economy in the future in all courts regarding this matter. The question needs to be resolved and warrants review by this Court.

The record of trial of this case demonstrates that the military judge failed to confirm that petitioner *voluntarily* intended to waive his right to counsel, failed to conduct an adequate inquiry into the competence of petitioner to waive his right to counsel, and failed to conduct an adequate inquiry to determine whether petitioner made a knowing and intelligent waiver of his right to an attorney. Under these circumstances, the petitioner was denied his right to counsel in violation of the Sixth Amendment to the Constitution of the United States. The Army Court and the Court of Military Appeals did not determine whether petitioner was *capable* of making an intelligent and informed decision to proceed *pro se*. Both courts ignored this Court's reemphasis in *Patterson*, *supra* at 298, of the necessity for "the most rigorous restrictions on the information that must be conveyed to a defendant and the procedures that must be observed, before permitting him to waive his right to counsel at trial."

Petitioner submits that the judge must, at a minimum, advise an accused considering proceeding *pro se* of the right to silence, and must include an explanation of how the accused could potentially make incriminating statements while questioning witnesses or making a closing statement. *See People v. Harris*, 434 P.2d 609 (Cal. 1967). The judge must advise the accused of all the *Von Moltke* factors, especially the maximum potential

sentence the accused faces if convicted of all charged offenses, potential defenses, and matters in mitigation. Finally, the advice given should also contain a warning of the ramifications of the failure to object as well as a full explanation of the elements of the charged offenses.

The question which must be resolved is how deeply a trial court must delve into an accused's understanding of the advantages, disadvantages and risks of proceeding *pro se*. The case at bar provides this Court with the opportunity to reaffirm the importance of *Faretta*, to issue clear guidance to the judiciary and to ensure that before a waiver of counsel is accepted, the judge must clearly identify, on the record, that the accused has *unequivocally* requested to proceed *pro se*, is competent to stand trial and participate in his defense, and that he is also competent to *conduct* his defense.

CONCLUSION

The petition for certiorari should be granted because of the importance of the constitutional issue involved and the fact that the United States Circuit Courts of Appeals, including the Court of Military Appeals, are split as to the interpretation of *Faretta*. The question presented is substantial and of crucial public significance.

Respectfully submitted,

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DECEMBER 1992

APPENDIX

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 66,857

CM 8800256

UNITED STATES,

Appellee,

v.

JOSEPH R. MIX (aka ROBERT J. MIX),
Private, U.S. Army,

Appellant.

Argued May 7, 1992

Decided Sept. 24, 1992

For Appellant: *Captain Teresa L. Norris* (argued); *Colonel Robert B. Kirby, Lieutenant Colonel James H. Weise, Captain Alan M. Boyd, Captain Michael P. Moran* (on briefs).

For Appellee: *Captain Glenn L. Kirschner* (argued); *Colonel Dayton M. Cramer, Lieutenant Colonel Daniel J. Dell'Orto, Captain Timothy W. Lucas* (on brief).

Opinion of the Court

CRAWFORD, Judge:

Appellant was tried by general court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of conspiracy to commit larceny, 3 specifications of desertion, violation of a general regulation by failing to store arms and ammunition in the arms rooms, 2 specifications of escape from confinement, destruction of government property, destruction of private property,

larceny, arson, housebreaking, and breaking restriction in violation of Articles 81, 85, 92, 95, 108, 109, 121, 126, 130, and 134, 10 USC §§ 881, 885, 892, 895, 908, 909, 921, 926, 930, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted pay grade.

After a new post-trial recommendation by the staff judge advocate, *see* 29 MJ 956 (ACMR 1990), the convening authority approved the sentence as adjudged. The Court of Military Review affirmed the findings and the sentence. 32 MJ 974 (1991).

We granted review on the following issues:

I

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING APPELLANT TO WAIVE ASSISTANCE OF COUNSEL AND PROCEED *PRO SE*.

II

WHETHER THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S WAIVER OF COUNSEL WHEN APPELLANT'S REQUEST TO PROCEED *PRO SE* WAS NOT CLEAR AND UNEQUIVOCAL.

III

WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO SUPPRESS WEAPONS FOUND DURING A SEARCH OF APPELLANT'S CAR.

IV

WHETHER THE MILITARY JUDGE ERRED BY DENYING A DEFENSE MOTION TO SUPPRESS A LETTER WRITTEN BY APPELLANT AND

SEIZED BY A MAIL CLERK AT THE INSTALLATION DETENTION FACILITY.

I

Initially at trial, appellant was represented by his detailed counsel and individual military counsel. Upon being advised of his rights to detailed counsel, military counsel, or civilian counsel at no expense to the Government, appellant expressed his desire to be represented by his uncle who was an attorney in California. His uncle was contacted but indicated that he had no interest in representing appellant and did not have a criminal practice.

At this time the military judge advised appellant of his right to represent himself but counseled him that if he did so he would have to abide by "the rules of evidence and rules of law." Upon learning that appellant was not a lawyer, the judge also indicated that a lawyer would have a better understanding of the elements of the offenses, the defenses involved, and the dangers that would be present, including identification of weaknesses in the Government's case. The judge did tell appellant he could have a lawyer at his table to advise him. Even so, appellant was advised that he would have to comport with the rules as to cross-examination and argument, and that this would be very difficult. Again, appellant requested his uncle who was contacted a second time. His uncle again declined to represent appellant. At this time appellant indicated he did not want to be represented by the detailed counsel or individual military counsel but, instead, wanted to represent himself. The judge again advised him that he would be held to the standards of a lawyer: would have to ask lawyer-like questions and conduct his own voir dire. The judge emphasized the difficulty of self-representation. Appellant did request that a lawyer sit with him at counsel table and advise him. The judge granted appellant's request.

II

The first two issues before this Court can be combined into the issue whether there was a clear and unequivocal waiver by an individual competent to proceed *pro se*. We hold that appellant was competent to proceed *pro se* and that the military judge's inquiry and advice were sufficient to ensure a clear and unequivocal waiver by appellant, who functioned very effectively as his own advocate.

The current standards regarding the right of self-representation based on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), are set forth in RCM 506(d), Manual for Courts-Martial, United States, 1984:

> *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

The military judge directed the convening authority to inquire into appellant's mental responsibility and competence to conduct his own defense. About 1 month later a sanity board consisting of two psychiatrists and a psychologist concluded that "[t]he accused has sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense—although he may choose not to do so." 32 MJ at 981. We agree with the Court of Military Review that

this was not a *pro forma* response but did relate to his ability to conduct his defense. 32 MJ at 981.

RCM 506(d) is based on *Faretta v. California*, *supra*. The Supreme Court there held that there is a constitutional right to self-representation, provided there is a knowing and intelligent waiver of the right to counsel. An accused, desiring to proceed without counsel "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.*, 422 U.S. at 835, 95 S.Ct. at 2511. The Court, however, did not specify what procedural undertakings were necessary to satisfy the "knowing and intelligent" waiver with "eyes open."

The right to proceed *pro se* attaches only if the defendant waives the right to counsel. *United States v. Wadsworth*, 830 F.2d 1500, 1504 (9th Cir.1987). The waiver of the right to counsel must be "unequivocally" asserted in order for the defendant to proceed *pro se*. *Fitzpatrick v, Wainwright*, 800 F.2d 1057, 1064 (11th Cir 1986). The United States Courts of Appeals are split as to the exact extent of the inquiry necessary to ensure a knowing and intelligent waiver. Some require a direct, on-the-record, searching inquiry by the trial judge which advises the defendant of the dangers and disadvantages of proceeding *pro se*. *See, e.g., United States v. McDowell*, 814 F.2d 245 (6th Cir.), *cert. denied*, 484 U.S. 980, 108 S.Ct. 478, 98 L.Ed.2d 492 (1987). Other courts have only required a minimal inquiry, in general warning against proceeding *pro se* rather than a specific detailed inquiry. *See, e.g., United States v. Campbell*, 874 F.2d 838, 846 (1st Cir.1989). A middle ground adopted by other courts is requiring an inquiry that is not searching but in which the totality of the circumstances establishes a knowing and intelligent waiver.

We need not decide what type of inquiry is required because the judge advised appellant on several occasions of the benefits of a lawyer and the disadvantages of representing oneself, specifically as to the rules of evidence, cross-examination, arguments, and voir dire. He also indicated that appellant would be at a disadvantage because the Government would be represented by a lawyer. Certainly, this warning was more detailed than that held sufficient in *United States v. Hafen*, 726 F.2d 21, 25 (1st Cir.), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984), set forth below:

> The trial court, on learning that appellant had decided at the last minute to proceed pro se, remarked:
>
> > "You have the Federal Defender made available to you. If you are foolish enough to want to go ahead on your own, that is your business. . . . Mr. Walker will be here and available, if you need him."
>
> The appellant responded:
>
> > "I understand fully what you are saying. I know about the old adage that, 'He who represents himself', you know . . . ."

Id. at 25-26. Here the judge implicitly found that appellant was "competent to understand the disadvantages of self-representation and that the waiver [was] voluntary and understanding." RCM 506(d). *See United States v. Streater*, 32 MJ 337 (CMA 1991).

Furthermore, the record demonstrates that appellant handled himself very well. He conferred with his defense counsel a number of times. He conducted his own voir dire, exercised challenges for cause and a preemptory challenge, objected to evidence as beyond the scope of the dirct examination, and made successful hearsay objections. He also asked for a delay to have an opportunity to talk to other witnesses.

Future issues on this subject could be precluded or at least expedited on appeal if there had been a more formal inquiry similar to that set out in the Appendix.

III

The third and fourth granted issues raise basic Fourth Amendment questions: *i.e.*, whether there was a search or seizure involving the accused's person, house, papers, or effects; and if there was such a search or seizure, then whether Fourth Amendment protections were satisfied.

A

As to the third granted issue (admissibility of the items found in appellant's car), we will examine the protections of the Fourth Amendment; that is, whether the search was authorized by competent authority based upon probable cause; whether there was a sufficient nexus between the items to be seized and the place to be searched; whether the specificity requirements were satisfied; and, if not, whether an exception to the exclusionary rule should be applied.

The specific question before us is whether the military judge erred by failing to suppress a pistol-grip shotgun and a semi-automatic rifle seized from appellant's car. *See* 32 MJ at 982. The search of the car for weapons was authorized by his battalion commander, Lieutenant Colonel John S. Haluski. Lieutenant Colonel Haluski was informed by the company commander, Captain Robert K. West, that the informant had knowledge of the existence of the weapons and that the weapons had been in the barracks. If they were not in the barracks, then they were in appellant's car. The informant's name was not given to the battalion commander but was known by the company commander, who told his superior that he considered the informant to be a good soldier with a "good reputation." The battalion commander also knew that

appellant was restricted to the unit area, that appellant had been seen driving a car along the edge of the battalion area the previous day, and that the car was last seen parked adjacent to the dining facility. Upon receiving the information, LTC Haluski authorized CPT West to search appellant's car "if the car was [found] behind the dining facility" as reported. The car was located in a parking area used by three battalions that formed a U-shape around the dining facility.

An impartial commander may authorize a search based on probable cause. Mil.R.Evid. 315(f)(2), Manual, *supra*, provides: "Probable cause to search exists when there is a reasonable belief that the . . . property . . . sought is located in the place . . . to be searched." In determining whether there is probable cause, the commander will apply the totality-of-the-circumstances test. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). While *Gates* indicated that *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), were unduly rigid, they are still alive. "*Gates* . . . did not announce that the informer's reliability and the source of his knowledge were no longer material in determining probable cause." *United States v. Moore*, 23 MJ 295, 298 (CMA 1987). While the *Aguilar-Spinelli* test has been rejected, it is still "highly relevant." *Illinois v. Gates*, 462 U.S. at 230, 103 S.Ct. at 2327. Drafter's Analysis, Manual, *supra* at A22-28. Although satisfying the *Aguilar-Spinelli* test is not a condition precedent to finding probable cause, if the *Aguilar-Spinelli* test is satisfied, so is the *Gates* test.

In this case, even the more rigid *Aguilar-Spinelli* test is met. The basis-of-knowledge test is met because the informant obtained his information as a result of personal observation. *Spinelli v. United States*, 393 U.S. at 423, 89 S.Ct. at 592 (White, J., concurring); *cf. United*

States v. Ochoa, 12 MJ 281 (CMA 1982). The reliability test is met because the informant was known to the company commander as a reliable person having a good reputation. *United States v. Layne*, 29 MJ 48 (CMA 1989); *United States v. Wood*, 25 MJ 46, 48 (CMA 1987). Additionally, as noted in *Layne* a false report by a military member to a commander may be an offense under Article 107, UCMJ, 10 USC § 907. *Id.* at 50 n.6.

The information CPT West gave to LTC Haluski provided reasonable grounds to believe the items to be seized were located in appellant's car in the parking lot adjacent to the dining facility. Thus the information CPT West gave to LTC Haluski satisfied the probable-cause requirement for search of appellant's car. The information was based on the personal observation of an individual from CPT West's company who had seen the weapons the day before in the barracks. A search of the barracks proved unproductive, and the battalion commander knew that appellant had been restricted to the unit and that the storage places for the weapons would be the barracks or appellant's car. The informant was considered reliable and had the reputation of being a good soldier.

It is not enough that there was probable cause for the search and a sufficient nexus between the items to be seized and the place to be searched and satisfaction of specificity requirements. The key question is whether theer was a search authorization by competent authority.

Mil.R.Evid. 315(d)(1) provides: "A commander . . . who has control over the place where the property . . . to be searched is situated or found" may grant a search authorization. Under the peculiar facts of this case all three battalion commanders as well as the brigade commander had control over the place where the automobile was located. This was a joint parking lot which surrounded the dining facility used by the three battalions. Thus, LTC Haluski could authorize a search of appel-

lant's car for a pistol-grip shot gun and a semi-automatic rifle. Alternatively, the good-faith exception applies because the battalion commander acted as a rational, reasonable commander having probable cause to believe that he could authorize a search of appellant's car. *United States v. Lopez*, 35 MJ 35 (CMA 1992); *People v. Ruiz*, 217 Cal.App.3d 574, 265 Cal.Rptr. 886 (3d Dist.1990) (good-faith exception saved warrant when officer failed to tell judge issuing out-of-county warrant that crimes under investigation occurred in issuing county).

B

The fourth granted issue is whether the judge erred in denying a motion to suppress a letter seized by a mail clerk at the pretrial confinement facility.

On January 12, 1988, Mrs. Zoellers, the acting mail clerk, was inspecting a letter written by appellant. While scanning the letter, she noticed references to the destruction of government property. "What did I destroy? Well I haven't been to court yet so of course I'm innocent 'of course?' Well remember the two story cirmanal[sic] records & courthouse accross [sic] from the M.P. station? It's now a parking lot for cars! Ha! Ha!" She seized the letter and turned it over to postal officials.

Army Regulation 190-47, The U.S. Army Correction System (Oct. 1, 1978) (Change 1, Nov. 1, 1980), controls censorship of mail going into and out of confinement facilities. The regulation provides for inspection of incoming and outgoing mail, but specifically creates a category of privileged correspondence, for example, letters to attorneys, congressmen, chaplains, and so forth. (Para. 5-10*b*(2), (3) and (11).)

Appellant admitted that he had been briefed by a noncommissioned officer on use of mail privileges and that mail was returned to him because it did not pass inspection. Like all prisoners, appellant had completed a form in which he consented to the inspection of his mail.

In *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919), the Supreme Court upheld seizure of a letter written by Stroud and given to a guard. Instead of mailing the letter, the prison official delivered it to the warden. At trial, the motion to suppress the letter was denied, and the Supreme Court held:

> In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances, there was neither testimony required of the accused, nor unreasonable search and seizure, in violation of his constitutional rights.

Id. at 21-22, 40 S.Ct. at 52-53.

Also in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), the Court permitted reading prisoner mail and cited approvingly regulations for censorship of mail matter, including contraband, obscenity, and solicitation of gifts. *Martinez* did not overrule *Stroud*, and "[s]ince censorship was held [in *Martinez*] to be justifiable under certain circumstances then, by implication, it appears that the mere reading of prisoner's mail is permissible." *State v. Matthews*, 217 Kan. 654, 538 P.2d 637, 642 (1975).

Thus, we hold that reading the letter was "lawful activity" under the circumstances. Mil.R.Evid. 316(d)(4)(C). *See also* Mil.R.Evid. 313, 314(h), and 316(f).

Next we turn to the question of the basis for the seizure of the letter. Mil.R.Evid. 316(b) provides that there may be a seizure "when there is a reasonable belief that the . . . evidence is . . . evidence of crime." Even if there was a lawful inspection, the letter may not be seized unless there was a basis for the seizure. In *Warden v.*

Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), the Court abolished the rule against seizing "mere evidence" because that rule could lead to indiscriminate seizures. The Court stated that "there must, of course, be a nexus . . . between the item to be seized and criminal behavior." *Id.* at 307, 87 S.Ct. at 1649. In upholding seizure of documents not listed in the warrant, the Supreme Court in *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S.Ct. 2737, 2749, 49 L.Ed.2d 627 (1976), stated: "[W]e conclude that the trained special investigators reasonably could have believed that the evidence specifically dealing with another lot in the Potomac Woods subdivision could be used to show petitioner's intent with respect to the Lot 13T transaction." Also in *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the Court indicated: "The seizure of property in plain view involves no invasion of privacy and *is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.*" *Id.* at 741-42, 103 S.Ct. at 1542-43 (quoting *Payton v. New York*, 445 U.S. 573, 587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980)) (emphasis added in *Brown*). The Court in a footnote indicated it need not decide whether a lower standard might be applied in some cases. *Id.* at 742 n. 7, 103 S.Ct. at 1543 n. 7. The letter of appellant, who was charged with burning down the staff judge advocate's office and courtroom, certainly was evidence of a crime. Thus, we also hold that seizure of the letter was proper.

The decision of the United States Army Court of Military Review is affirmed.

Judge GIERKE concurs.

APPENDIX

If the defendant does not wish counsel, the following questions should be asked:

(1) Have you ever studied law? What education do you have? Do you understand English?

(2) Have you ever represented yourself or another in a criminal trial?

(3) From the trial counsel's statement of the charges, do you know the charges against you?

(4) Are you familiar with the Military Rules of Evidence?

(5) Do you realize that the Military Rules of Evidence govern what evidence may be introduced and those rules must be followed even though you are representing yourself?

(6) Are you familiar with the Rules for Courts-Martial?

(7) Do you realize those rules govern how this case is tried?

(8) Do you understand that you would be better off with a trained lawyer who would be familiar with the Rules of Evidence and the Rules for Courts-Martial?

(9) Do you realize that representing yourself is not a matter of telling your story? If you testify, you cannot just give a statement. You must ask yourself questions and then give answers, according to the Rules of Evidence and the Rules for Courts-Martial.

(10) Do you understand a lawyer has the experience and training in trial procedure to best advocate your position at trial?

(11) Do you realize that not following the rules of procedure or being familiar with the rules of evidence, you may do something which in effect will have unintended consequences, such as asking a question which might be considered a statement or an admission by you?

(12) Do you understand that proceeding *pro se* will not allow you to complain on appeal about the competence of your own representation?

(13) Do you realize that your case may be presented less effectively because you will be both your own advocate and the defendant?

(14) Do you realize the maximum penalty in this case is ———?

(15) I think it is unwise for you to represent yourself, not being familiar with those rules. I strongly urge you not to try to represent yourself. Knowing all that I have told you, do you still wish to represent yourself?

(16) Is this decision made as a result of any threats or force against you or is it a decision you make of your own free will?

(17) Do you wish to have a counsel sit with you at the counsel table and be available to assist you? I recommend you do so.

See generally Guideline For District Judges from 1 Bench Book for United States District Judges § 1.02-2 to -5 (Dec. 1991); earlier version *quoted* in *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir.1987); *see Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948); *United States v. Streater*, 32 MJ 337 (CMA 1991)

(TO MJ: You must make a finding as to whether the accused is competent to proceed *pro se* and whether this is a voluntary decision.)

COX, Judge (concurring):

I concur. *United States v. Streater*, 32 MJ 337 (CMA 1991). *See also United States v. Lopez*, 35 MJ 35, 42 (CMA 1992) (Cox, J., concurring); *United States v. Alexander*, 34 MJ 121 (CMA 1992); *United States v. Morris*, 28 MJ 8 (CMA 1989).

SULLIVAN, Chief Judge (concurring in the result):

In view of the principal opinion's reliance on *United States v. Lopez*, 35 MJ 35 (CMA 1992), I must again concur in the result. *See* my separate opinion in *Lopez*, 35 MJ at 46.

WISS, Judge (concurring in part and in the result):

I concur in the majority's treatment of Issues I, II, and IV that were granted review by this Court.

As to Issue III, I—like the Court of Military Review—find no need to address the military judge's determination that LTC Haluski lacked authority over the area searched. Instead, I agree with the majority that, as the Court of Military Review and the military judge ruled—the good-faith exception applies to this search.

Lieutenant Colonel Haluski had probable cause to authorize the search; and CPT West, the officer who applied for and executed the search authorization, had an objectively reasonable basis to believe that Haluski had authority over the area in which appellant's car was found. Thus, consistent with the principles I discussed in my separate opinion in *United States v. Lopez*, 35 MJ 35, 49 (CMA 1992), I conclude that West acted in reasonable, good-faith reliance on the lawfulness of Haluski's authorization. *See United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8800256

UNITED STATES,
Appellee,

v.

PRIVATE E2 JOSEPH R. MIX, (AKA ROBERT J. MIX),
568-45-5452, UNITED STATES ARMY,
Appellant.

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4 Jan. 1990

For Appellant: Terence J. Mix, Esquire, Captain Timothy P. Riley, JAGC (on brief).

For Appellee: Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Gary L. Hausken, JAGC (on brief).

Before KUCERA, GILLEY, and GIUNTINI, Appellate Military Judges.

OPINION OF THE COURT

GIUNTINI, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members and, contrary to his pleas, he was found guilty of numerous offenses. His adjudged and approved sentence is a dishonorable discharge, confinement for twenty-five years, forfeiture of all pay and allowances, and reduction to Private E1.

Appellant dismissed counsel and proceeded *pro se* at his court-martial. At the conclusion of the trial, he told the military judge that he wanted to handle his own post-trial matters and he requested that the authenticated record of trial and the staff judge advocate's recommendation be served on him. In addition, the appellant indicated on his post-trial and appellate rights advisement form that he wanted the post-trial recommendation served on him.

The staff judge advocate's recommendation was prepared on 24 April 1988. The convening authority took action on 1 June 1988. Appellant apparently executed a receipt for the authenticated record of trial on 15 August 1988. There is no indication that the appellant was served with a copy of the staff judge advocate's recommendation prior to his receipt of the authenticated record of trial. On 25 August 1988, the appellant mailed matters to the convening authority for his consideration. Of course, this was months after the convening authority had already taken action on the case.

In an affidavit filed with this court by appellate government counsel, the staff judge advocate outlines certain post-trial occurrences which, in the usual case, might be sufficient for one to conclude that the appellant agreed to be represented by Captain H, United States Army Trial Defense Service (TDS), for the purpose of preparing and submitting post-trial matters under the provisions of Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105 and 1106.[1] If Captain H had

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[1] Captain H secured a twenty-day extension for submission of such matters; however, from the staff judge advocate's affidavit, it appears that he did not send them in a timely fashion for the convening authority's consideration. According to the affidavit, Captain H "explained that he had been extremely busy and unable to prepare any post-trial submissions in the case. . . ." The affidavit suggests that Captain H eventually did submit matters but that they were sent after action had been taken by the convening authority.

been representing the appellant, then the government would have been bound to communicate with the appellant through his counsel.

This is not the usual case where we may presume that all of the defense counsel's actions were taken on the authority of the accused. Appellant expressed his distrust with his military lawyers and proceeded *pro se* at his court-martial. At the conclusion of the trial, he told the military judge he would continue to represent himself and that he wanted the staff judge advocate's recommendation and the authenticated record of trial served on him. After trial, he reiterated in his appellate rights advisement form that he wanted the recommendation "served on [him] personally." From the staff judge advocate's affidavit, it appears that Captain H did not timely submit matters on behalf of the appellant. The appellant, however, mailed matters for the convening authority's consideration within 10 days of appellant's receipt of the record of trial. The post-trial matters submitted by appellant were sent well after the convening authority had taken action.

The record of trial does not contain information sufficient for this court to conclude that the appellant had changed his mind about representation by military counsel and had agreed to have Captain H served with the staff judge advocate's recommendation and the authenticated record of trial. We do not question the good faith of the staff judge advocate or his staff in deciding to deal with appellant through Captain H. However, in this case, without some indication from the appellant, or Captain H, that the appellant had changed his mind and wanted Captain H to be served with the recommendation and action we are left to speculate about this important issue.[2]

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[2] We note from the staff judge advocate's affidavit that initially there was some confusion whether the appellant would be represented, post-trial, by Captain S or Captain H; Captain S was about

The appellant should be given an opportunity to consult with counsel about possible post-trial representation and submissions; also, a new staff judge advocate recommendation and convening authority action is in order. *See* Uniform Code of Military Justice, Article 38(c), 10 U.S.C. § 838(c) (1982), Rules for Courts-Martial 1105 and 1106, and *United States v. Polk*, 27 M.J. 812 (A.C.M.R.1988).

We have not considered the other errors raised by appellate defense counsel, or appellant personally, because we do not have before us proper findings and sentence approved by the convening authority. *See generally United States v. Evans*, 49 C.M.R. 674 (A.C.M.R.1974).[3]

The action of the convening authority dated 1 June 1988, is set aside. The record of trial will be returned to the same or a different convening authority. The appellant will be given a reasonable opportunity to consult with counsel and to decide what matters if any he wishes to forward to the convening authority for his consideration. A new staff judge advocate recommendation and convening authority action will be prepared. The appellant's desires about post-trial representation by counsel will be documented in the staff judge advocate's recommendation, or by other appropriate means.

Senior Judge KUCERA and Judge GILLEY concur.

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to leave the service and Captain H was pending orders directing his permanent change of station. Eventually, it was determined that Captain H "had been appointed as the attorney responsible for assisting Private Mix in the preparation and submission of post-trial matters. . . ." Again, there is no indication of the accused's desires in this regard.

[3] The staff judge advocate is not precluded from discussing the errors assigned by appellate defense counsel and the appellant personally. *United States v. Evans*, 49 C.M.R. at 675.

APPENDIX C

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8800256

UNITED STATES,
Appellee,

v.

PRIVATE E2 JOSEPH R. MIX (aka ROBERT J. MIX),
568-45-5452, United States Army,
Appellant.

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24 May 1991

For Appellant: Captain Timothy P. Riley, JAGC, (argued), Lieutenant Colonel Russell S. Estey, JAGC, Terence J. Mix, Esquire (on brief).

For Appellee: Captain Jonathan F. Potter, JAGC, (argued) Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Gary L. Hausken, JAGC, Captain Timothy W. Lucas, JAGC (on brief).

Before De GIULIO, NAUGHTON, and VARO, Appellate Military Judges.

OPINION OF THE COURT ON FURTHER REVIEW

VARO, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his

pleas, he was convicted of conspiracy to commit larceny, three specifications of desertion, violation of a general regulation by failing to store arms and ammunition in the arms room, two specifications of escape from confinement, destruction of government property, destruction of private property, larceny, arson, housebreaking, and breaking restriction. His numerous offenses were in violation of Articles 81, 85, 92, 95, 108, 109, 121, 126, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 885, 892, 895, 908, 909, 921, 926, 930, and 934 [hereinafter UCMJ]. The appellant's adjudged and approved sentence provides for a dishonorable discharge, confinement for twenty-five years, reduction to the grade of Private E1, and total forfeitures.

On 4 January 1990, this court set aside the action of the convening authority because the appellant, representing himself, *pro se*, at trial and for the submission of post-trial matters, had not been served with the staff judge advocate's post-trial recommendation. *United States v. Mix*, 29 M.J. 956 (A.C.M.R.1990).[1] Because of the improper service, the appellant's post-trial submissions under Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105 were not considered. The appellant's case was sent to the Commander, United States Army Combined Arms Center and Fort Leavenworth (Provisional). A new post-trial recommendation was prepared and properly served. On 20 September 1990, the appellant's sentence was again approved as adjudged.

Although the appellant has raised several errors personally and through counsel, the primary issue before us is the military judge's determination to allow the appellant to represent himself, as set forth in the first two

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[1] In returning the case for a new review and action, this court did not address any of the other issues raised by the appellant in his original appellate submission.

assignments of error.[2] Specifically, the appellant asserts that the military judge erred by allowing him to waive assistance of counsel. The appellant further asserts that the military judge erred by accepting the appellant's waiver of counsel because his request to proceed *pro se* was not clear and unequivocal. We disagree on both issues, and hold that the record of trial establishes that the appellant was competent to defend himself, that he was fully advised of and understood the ramifications of defending himself, and that his request to proceed *pro se* was voluntary and understanding.

I

The appellant did not defend himself *pro se* throughout the entire proceedings. At the outset, the appellant was represented by two military trial defense counsel, Major A and Captain B. Because of a potential conflict of interest regarding another case, the lead counsel, Major A recused himself from the case. The assistant defense counsel handled initial matters in the case but forwarded the appellant's request to retain Major A despite the conflict. This request was denied. The military judge eventually ordered Major A be made available for this case.

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[2] Before this court, the appellant is represented by appointed military appellate defense counsel and by civilian counsel (on brief). At a hearing held on 1 April 1990, the appointed military appellate defense counsel clarified issues which the appellant is not raising before the court: the appellant is not contending that he was not mentally responsible either at the time of the offense, or at the time of trial; and, the appellant is not contending that he was not competent to *participate* in his defense at trial. Following questioning by the court, appellant's counsel stated that there also is no contention that the appellant is not competent to participate in his appeal. Counsel further stated that while some of the appellant's written submissions were not always clear, he (counsel) had clear conversations with the appellant and he had no question about the appellant's competency to participate in the appellate process.

Following this determination, the military judge again advised the appellant of his rights to counsel. The appellant stated that he wanted to be represented by his uncle from California.[3] Contact with the appellant's uncle by the military defense counsel revealed that the appellant's uncle had no involvement in the practice of criminal law and, therefore, had no interest in representing appellant at trial. The appellant advised the military judge that he did not believe his defense counsel, and further, that if his uncle could not defend him, he would like to defend himself. As noted in the following colloquy, after further discussion with the military judge, the appellant decided to keep his two military defense counsel, at least until he was able to further confer with his uncle.

ACC: If I can't get my uncle, I don't want a lawyer.

MJ: What do you mean you 'don't want a lawyer'?

ACC: I trust him and stuff; he's my uncle.

MJ: I understand that. Okay, you said if he won't defend you, you don't want a lawyer?

ACC: Uh—

MJ: Is what you're saying, you want to represent yourself?

ACC: Well—I'm not sure how to represent myself, but—I just don't want a lawyer.

MJ: You have the right to represent yourself; I'm not going to force a lawyer on you, any particular lawyer, but if you choose to represent yourself, you're going to have to comport with the rules of evidence and rules of law. Do you understand that?

ACC: [No response.]

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[3] The appellant's uncle is the civilian attorney currently representing him (on brief) before this court on appeal.

MJ: In other words you're going to have to behave like a lawyer if you want to defend yourself, that . . . is [if] you don't want another lawyer. Do you understand?

ACC: I do.

MJ: Now in order to assist you in doing that, I would require that you have a lawyer at the table present to advise you so that you could ask them questions on procedure, because it would not be my place and I cannot defend you . . ., advise you and . . . tell you what to do. Do you understand that?

ACC: [Moving his head in an affirmative manner.]

MJ: So if you choose to defend yourself, to . . . cross-examine the witnesses, to make argument, you have that right too, but before you do that, I would have a lawyer present, available for you, sitting at the table so that you could turn to them for advice on how to properly do that. Do you understand that?

ACC: I don't really—I don't trust 'em.

MJ: I understand what you're saying, but do you understand what I'm saying?

ACC: [No response.]

MJ: In other words so that you knew how to ask the questions, so that you knew what the procedure was, you could turn to the lawyer and say, 'Okay, . . . how do I do that?' and they would give you advice.

ACC: I don't want to represent myself; I want my uncle to represent me.

MJ: Okay, but what if your uncle says he won't?

At this point in the discussion, the appellant again stated that he wanted his uncle to represent him, and that he wished to talk to his uncle. The military judge

then directed the trial defense counsel to assist the appellant in contacting his uncle. During the next recess, the appellant was able to reach his uncle only to confirm that his uncle would not be able to represent him. The appellant then advised the military judge that he wished to retain his two military counsel for the present time. The appellant continued with his two military trial defense counsel through all motions. Just prior to the assembly of the court with members, however, the appellant again stated:

ACC: I don't want any lawyers.

MJ: Okay, Private Mix, what do you mean you don't want any lawyer?

ACC: I don't want Captain B or Major A.

MJ: Okay, then who is going to defend you?

ACC: (No response.)

MJ: Do you intend to try and defend yourself?

ACC: Yes.

MJ: Okay, do you understand, Private Mix, if you desire to do that—you have the right to do that, but do you understand if you want to do that, I'm going to hold you to the standards of a lawyer? In other words—and if you desire to take the stand, it is going to be necessary that you have a lawyer ask you the questions. You can write them out for them if you desire, but you are going to have to have a lawyer to ask you the questions. Because once you take that witness stand, you become a witness. Do you understand that?

ACC: Yes.

MJ: Okay, now are you telling me that you want to conduct all the voir dire and you want to do everything yourself?

ACC: (Indicated in the affirmative.)

The military judge advised the appellant that he would release Captain B and Major A, but that they would be available to assist the appellant on questions of law. The discussion then continued:

MJ: Okay, are you telling me that you want to defend yourself?

ACC: Yes.

MJ: Do you understand that even though you don't trust the lawyers, it is necessary that you have someone there to advise you concerning what the law is? In other words, if you ask a question and it is objected to, you are going to have to justify the question legally, and the purpose behind a lawyer is to give you the advice so that you know what to say. Do you understand that?

ACC: (Indicated in the affirmative.)

. . . .

MJ: Okay, you have the right to be defended by a lawyer. You have the right to defend yourself; do you understand, right?

ACC: (Indicated in the affirmative.)

MJ: Okay, and what do you want to do. You tell me in your own words exactly what you are after, what you want to do.

ACC: I don't want them anywhere around me, and I want a—I want a different lawyer.

MJ: Who do you want?

ACC: (No response.)

. . . .

MJ: . . . Do you intend to defend yourself; you want to defend yourself?

ACC: Yes.

. . . .

MJ: Okay. And what you are saying is, you want a different lawyer available to assist you in defending yourself?

ACC: Yes.

MJ: To advise you concerning questions of law?

ACC: Yes.

. . . .

MJ: In other words, you are going to come into court, and you want me to have a lawyer sitting next to you, who is totally unfamiliar with the posture of the evidence. In other words, what the charges are, with the pretrial investigation, what the investigation is, and you want me to have him there just to give you an assist as to whether or not questions are permissible and things of that nature. Now, if you do that, what you are doing is you are coming in here and you are going to let the Government present their evidence, their counsel, and you are going to come against them without a counsel, and you are facing potential confinement. Do you understand that? You know your past behavior has shown that you don't desire to remain in confinement. Do you understand that?

ACC: (Indicated in the affirmative.)

. . . .

MJ: Do you understand that a lawyer is the best way to defend yourself?

ACC: I don't trust them.

. . . .

MJ: What makes you think you are going to trust the next lawyer?

ACC: I'll try.

MJ: But what you are telling me is you want to defend yourself.

ACC: (Indicated in the affirmative.)

. . . .

MJ [after appointing CPT L to assist the appellant]: . . . . Okay, Private Mix, you indicated to me that . . . you desire to represent yourself and have Captain L to advise you. Now, do you remember the warning I gave you earlier about disrupting the proceedings?

ACC: Yes.

MJ: Now, if, as counsel, you disrupt the proceedings, do you understand the trial is going to continue?

ACC: Uh-huh.

MJ: And do you understand that you are going to give up your right to defend yourself, if you become too disruptive?

ACC: (Indicated in the affirmative.)

MJ: Do you have any questions about that?

ACC: (Indicated in the negative.)

MJ: Now do you understand the danger in defending yourself?

ACC: (No response.)

MJ: In other words, you are a . . . non-trained lawyer—

ACC: Yes.

MJ: You are not a lawyer, you have no legal training, do you?

ACC: (Indicated in the negative.)

MJ: Okay, . . . do you know . . . what we call the elements of the offenses, the parts that are necessary to prove the offense?

ACC: No.

MJ: That is right, you don't know anything about the law, and that is the question. And you know, several times issues can turn on just whether the Government can prove one of the elements. . . . Do you understand that?

ACC: (Indicated in the affirmative).

MJ: And it is necessary that you understand what the elements are. Now, do you understand what the danger is in not understanding them and trying to defend yourself? In other words, you are not going to know what to attack, where is the essential areas. Do you understand that?

ACC: (Indicated in the affirmative.)

MJ: Are you sure you want to do that?

ACC: (Indicated in the affirmative.)

MJ: Do you understand the danger . . . [of what] you are doing?

ACC: (No response.)

MJ: In other words, what makes you think you are competent to defend yourself? Why do you want to defend yourself?

ACC: I don't trust my lawyers. There is no one else.

. . . .

MJ: Okay . . . at this stage . . . I'm going to allow you to defend yourself, because you have that right—

ACC: Okay—

MJ: I'm going to have Captain L present at counsel table for you; do you understand that?

ACC: Uh-huh.

The discussion concluded with the military judge again advising the appellant that should he become disruptive, Major A and Captain B would take over the defense. The appellant agreed with this procedure. Major A and Captain B were directed to remain in the back of the courtroom and take notes if desired. They were also directed not to advise the appellant or Captain L regarding trial tactics, as this was a matter now within the responsibility of the appellant as counsel for himself.

II

Before this court, the appellant urges that there are, by law, two distinct levels of competency which must be reached before self-representation may be allowed. The appellant asserts that his competency must be tested first to determine if he is able to participate at trial. A further, more comprehensive test is proposed to determine if, while competent to *participate*, an accused is competent to *conduct* his own defense.

The appellant cites *United States v. Tanner*, 16 M.J. 930 (N.M.C.M.R.1983), in support of his position. In *Tanner*, the Navy Court set forth what it labeled as the "constitutionally minimum standard of inquiry necessary to establish a valid and effective waiver of representation." This standard was drawn directly from *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948):

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to charges and circumstances in mitigation thereof,

> and all other facts essential to a broad understanding of the whole matter.

Tanner, 16 M.J. at 935, *quoting Von Moltke*, 332 U.S. at 724, 68 S.Ct. at 323.

The appellant correctly notes that the *Von Moltke* language has, in the past, not been considered to be a concrete rule. Rather, it has been looked upon as general guidance to be considered by judges. *United States v. Howell*, 29 C.M.R. 528, 533 (C.M.A.1960).

Citing *United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R.1989), the appellant asserts that the "constitutionally minimum" standard of *Tanner*, applying *Von Moltke*, has now become a clear rule rather than a guide. The appellant bases this conclusion on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in which the Supreme Court established that the right of self-representation is constitutionally based in the Sixth Amendment. We disagree with appellant's position that *Faretta* makes the *Von Moltke* standards mandatory. Therefore, we do not accept the Navy Court's position in *Freeman* that requires the military judge to formally establish a second, greater level of competency for an accused who wishes to represent himself.[4]

Although *Faretta* cites *Von Moltke*, it really establishes a standard of its own on the issue of self-representation:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo

[4] We also note that *Freeman* is quite distinct from the case at bar as it entailed a significant question of the accused's mental responsibility in addition to the question of competency to represent himself. In our view, this mixing of issues can cause the reader of *Freeman* to mix the standards.

> those relinquished benefits. *Johnson v. Zerbst*, 304 U.S. [458] at 464-465, 58 S.Ct. [1019], at 1023 [82 L.Ed. 1461 (1938)]. Cf. *Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' *Adams v. United States ex rel. McCann*, 317 U.S. [269] at 279, 63 S.Ct. [236] at 242 [87 L.Ed. 268 (1942)].

Faretta, 422 U.S. at 835, 95 S.Ct. at 2541.

This standard is much broader than that of *Von Moltke* and provides general guidelines rather than specific rules. It in no way provides that an accused must have a "higher level" of competence to defend himself as the appellant asserts. Rather, it merely establishes that an inquiry must be made on the record to insure that one who chooses self-representation knows what he is doing.

III

The current standards regarding the right of self-representation before courts-martial are set forth in Rule for Courts-Martial 506(d):

> (d) *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. *Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.* The military judge may require that a defense counsel remain present even if the accused waives coun-

> sel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure. (Emphasis added).

These standards are taken directly from the Manual for Courts-Martial, 1969 (Rev. ed.), and *Faretta v. California*. *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 506(d) analysis, app. 21, at A21-27. Therefore, our decision rests on whether the military judge had sufficient information to find that the appellant was competent to understand the disadvantages of self-representation, and whether the appellant's waiver of counsel was voluntary and understanding.

In this regard, on 10 November 1987, the military judge directed that the convening authority inquire into the mental responsibility and capacity of the appellant. Paragraph 3d of his order directed that the following specific question be addressed as required by Rule for Courts-Martial 706(c)(2)(D):

> d. Does the accused have sufficient mental capacity to understand the nature of the proceedings and to *conduct or cooperate intelligently in the defense*?" (Emphasis added.)

On 18 December 1987, a sanity board consisting of two psychiatrists and one psychologist rendered its report which included the following response to the above question from the military judge:

> d. The accused has sufficient mental capacity to understand the nature of the proceedings and to *conduct or cooperate intelligently in the defense*—although he may choose not to do so. (Emphasis added.)

The appellant asserts that the language, "conduct or cooperate," in these documents is *pro forma* in nature

because of the language of Rule for Courts-Martial 706 and, therefore, should not be considered to have truly addressed the issue of self-representation. We disagree. The appellant has shown no basis for his assumption that the language from the sanity board should be interpreted any other way than it is clearly written, *i.e.*, that the appellant was competent to conduct or cooperate in his defense.

The appellant also asserts that this court should ignore the November 1987 sanity board and, instead, rely on an August 1990 psychological evaluation of the appellant.[5] On 24 August 1990, the evaluating psychologist concluded that "[i]t is *possible* that, at the time of his trial, the appellant *may* have suffered from a severe mental disease that rendered him incompetent to participate in handling his own defense." (Emphasis added). The court has not been presented nor has it found any basis to ignore the November 1987 sanity board and accept the speculations of the August 1990 psychological evaluation.

Our review of the colloquy between the military judge and the appellant leads us to conclude that the military judge did not err in allowing the appellant to represent himself. The military judge repeatedly questioned the appellant about his desire and intent. He advised the appellant on several occasions about the benefits of having a lawyer. He also advised him of the dangers of representing himself, noting that the appellant was not familiar with the specific elements the government would have to prove nor of the possible defenses available. The military judge called the appellant's attention to the fact that he would be at a great disadvantage because the government would be represented by a lawyer. Despite this

[5] This evaluation was completed by a psychologist at the request of the military trial defense counsel who assisted the appellant following this court's initial return of the record of trial for a new review and action.

counseling, the appellant clearly continued his request to represent himself. Based on our review of the sanity board and the in-depth continued colloquy between the military judge and the appellant, we have no doubt that the military judge was correct in determining that the appellant was "competent to understand the disadvantages of self-representation and that the waiver [was] voluntary and understanding." Rule for Courts-Martial 506(d).

We also note that the issue of the appellant's competence was raised again later in the trial. In our opinion, the military judge's determination to allow the appellant to continue to represent himself was well-founded. By this time in the trial, the appellant had made appropriate challenges, asked appropriate questions, and raised appropriate objections to several government questions. Although he regularly sought the advice of the legal advisor provided by the court to assist him, the record of trial reveals that once the members had been impaneled, the defense function was fully and adequately under the control of the appellant. We recognize that the appellant's performance at trial cannot become the basis which establishes his state of mind at the time he requested self-representation. *United States v. Mogavero*, 20 M.J. 762 (A.F.C.M.R.1985). However, once the military judge makes an appropriate determination of competency, as he did in this case, we believe consideration of the appellant's conduct of the trial to be relevant because it supports the military judge's original conclusion that the appellant clearly knew what he was doing.

The assignments of error that the military judge erred in allowing the appellant to proceed *pro se* and that the appellant's request to do so was not clear and unequivocal, are without merit.

IV

In his third assignment of error, the appellant asserts that the military judge erred by admitting into evidence two weapons (a pistol-gripped shotgun and a semi-automatic rifle) seized from the appellant's car. These weapons were seized after a search authorization was granted by the appellant's battalion commander. The appellant asserts that the battalion commander did not have sufficient information upon which to make a probable cause determination. The appellant further asserts that the search occurred in an area not under the control of the battalion commander.

In admitting the evidence, the military judge found sufficient probable cause. The military judge agreed with the appellant that the search was conducted in an area outside the control of the battalion commander, but he found the search had been done in good faith. We concur with the military judge's determination and find no error.

The search resulted from a report to the appellant's company commander that the appellant had been seen with "exotic weapons." The company commander searched the appellant's room under his own authority, but found no weapons. He then called the battalion commander to request authority to search the appellant's car. The source of the company commander's information that the weapons might be in the car asked that his name not be given to the battalion commander. He was not an anonymous source, however, for the company commander knew him personally. When the battalion commander asked general questions about the source, the company commander told him that the source was a soldier of good quality and good reputation. The battalion commander also was told that the appellant had been seen driving his car on the previous day at a time when the appellant was restricted to the general barracks area because of punishment imposed on him under Article 15, UCMJ.

In our opinion, judging the totality of the circumstances, the battalion commander had sufficient credible information to justify his determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Manual for Courts-Martial, United States, 1984, Military Rules of Evidence 315(c)(2) [hereinafter Mil.R.Evid.]. *See United States v. Wood*, 25 M.J. 46 (C.M.A.1987).

With regard to the location of the car when searched, the government questions the military judge's determination that the parking lot where the car was located was not an area under the control of the battalion commander. Mil.R.Evid. 315(d)(1). We see no need to resolve that issue. There is no evidence in the record of trial which indicates that the battalion commander "abandoned his detached and neutral" role in making the probable cause determination or in believing he had some authority over the parking lot in which the appellant's car was located. Although the search may have occurred outside the battalion area, the close proximity of the parking lot to the battalion leads us to agree with the military judge that the search was conducted in a good faith belief that it was properly authorized. Mil.R.Evid. 311(b)(3)(C); *United States v. Leon*, 468 U.S. 897, 926, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984).[6]

V

We have considered all other issues raised personally by the appellant pursuant to *United States v. Grostefon*,

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[6] *But see United States v. Morris*, 28 M.J. 8, 12 (C.M.A. 1989), wherein Chief Judge Everett expresses, in dicta, that the good faith exception should be applied in courts-martial only to searches based on warrants or authorizations issued by military judges or military magistrates.

12 M.J. 431 (C.M.A.1982), and through counsel, and find them to be without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge De GIULIO and Judge NAUGHTON concur.

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SUPREME COURT, U.S.
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No. 92-963

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH R. MIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the inquiry conducted by the trial judge before allowing petitioner to proceed pro se established that petitioner knowingly and intelligently waived his right to the assistance of counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-963

JOSEPH R. MIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-15a, is reported at 35 M.J. 283. The opinion of the Army Court of Military Review, Pet. App. 20a-38a, is reported at 32 M.J. 974. An interlocutory opinion of the Army Court of Military Review, Pet. App. 16a-19a, is reported at 29 M.J. 956.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. The petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of conspiracy to commit larceny, three specifications of desertion, violation of a general regulation by failing to store arms and ammunition properly, two specifications of escape from confinement, destruction of government property, destruction of private property, larceny, arson of the building that housed the Fort Campbell legal offices and courtroom, housebreaking, and breaking restriction, in violation of Articles 81, 85, 92, 95, 108, 109, 121, 126, 130, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 885, 892, 895, 908, 909, 921, 926, 930, and 934. Pet. App. 20a-21a. Petitioner was sentenced to confinement for 25 years, reduction to the lowest enlisted rank, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence. The Army Court of Military Review affirmed the conviction and sentence. The Court of Military Appeals affirmed.

1. The Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, establishes a comprehensive scheme of military tribunals. A military judge presides over trial courts, or courts-martial, and cases are tried to a panel of court members, who function like jurors in the civilian criminal justice system. See Arts. 25 and 26, UCMJ, 10 U.S.C. 825 and 826. If convicted by court-martial, the defendant can appeal to the appropriate court of military review. Art. 66, UCMJ, 10 U.S.C. 866. The courts of military review are established by the Judge Advocate General of each service (Army, Navy-Marine Corps, Air Force, and Coast Guard). Arts. 1(1) and 66(a), UCMJ, 10 U.S.C.

801(1) and 866(a). Decisions of the courts of military review are reviewed by the Court of Military Appeals, an Article I court consisting of civilian judges. Art. 67(a), UCMJ, 10 U.S.C. 867(a). The Court of Military Appeals must hear cases involving a sentence of death and cases ordered reviewed by a Judge Advocate General; in all other matters the court's review is discretionary. Art. 67(b), UCMJ, 10 U.S.C. 867(b). This Court has had certiorari jurisdiction over decisions of the Court of Military Appeals since 1984. 28 U.S.C. 1259; see Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

The courts-martial and military appellate courts follow military rules of procedure and evidence. See generally *Manual for Courts-Martial, United States —1984* (*Manual*). A defendant has the right to be represented at a general court-martial by military counsel detailed to him by the government; by military counsel of the defendant's choice, if such counsel is reasonably available; or by civilian counsel if such counsel is provided at no cost to the government. See Rule for Courts-Martial 506(a). Rule 506(d) of the Rules for Courts-Martial provides for an accused to waive his right to counsel under the following circumstances:

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require

> that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

Rule 506(d) codifies this Court's decision in *Faretta* v. *California*, 422 U.S. 806 (1975). See *Manual* A21-27. In *Faretta*, this Court framed the constitutional inquiry as follows:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

422 U.S. at 835 (citations omitted); see also *id.* at 834-835 n.46 (noting that a trial judge could order "standby counsel" to aid in the defense and terminate self-representation for disrupting the proceedings).

2. a. Before trial, petitioner was represented by detailed counsel, Captain Best. Pet. App. 22a; Gov't C.M.A. Br. 14. At a pretrial hearing before the trial

judge,[1] petitioner asked to be represented by a specific attorney, Major Arnold, and he further asked that Captain Best be allowed to remain on the case to assist Major Arnold. Pet. App. 22a; Gov't C.M.A. Br. 14. The trial judge directed that Major Arnold be appointed to represent petitioner along with Captain Best. Pet. App. 22a. The judge then advised petitioner again of his right to counsel. Pet. App. 23a.

At that time petitioner expressed his desire to be represented by his uncle, an attorney in California. Pet. App. 3a, 22a-23a. Petitioner's military counsel contacted the uncle, who said that he did not have a criminal practice and had no interest in representing petitioner. Pet. App. 23a. Petitioner told the trial judge: "If I can't get my uncle, I don't want a lawyer." *Ibid.* The trial judge informed petitioner that he had a right to defend himself, but pointed out the numerous problems with taking that course. See Pet. App. 23a-24a.

Petitioner then asked to speak with his uncle personally; the uncle confirmed that he would not represent petitioner. Pet. App. 24a-25a. Petitioner advised the trial judge that he would keep his current attorneys, and he did so throughout the pretrial proceedings. Pet. App. 25a. Immediately before trial, however, petitioner announced his intention to represent himself. *Ibid.* The trial judge then engaged in a long colloquy with petitioner about the hazards of defending himself. Pet. App. 25a-30a. Because

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[1] Art. 39(a), UCMJ, 10 U.S.C. 839(a), provides for a pretrial hearing, outside the presence of the court members, to resolve motions and other preliminary matters.

petitioner repeatedly indicated that he wished to conduct his own defense, the trial judge granted his request to proceed pro se. Pet. App. 29a.

b. The Army Court of Military Review affirmed. Pet. App. 20a-38a. The court concluded that the trial judge properly allowed petitioner to defend himself, Pet. App. 34a-35a:

> The military judge repeatedly questioned [petitioner] about his desire and intent. He advised [petitioner] on several occasions about the benefits of having a lawyer. He also advised him of the dangers of representing himself * * *. The military judge called [petitioner's] attention to the fact that he would be at a great disadvantage because the government would be represented by a lawyer. Despite this counseling, [petitioner] clearly continued his request to represent himself.

c. The Court of Military Appeals granted review of petitioner's claim that the military judge erred in allowing him to represent himself.[2] Pet. App. 2a. The court affirmed, finding that petitioner's waiver of counsel was knowing and intelligent "because the judge advised [petitioner] on several occasions of the benefits of a lawyer and the disadvantages of representing oneself, specifically as to the rules of evidence, cross-examination, arguments, and voir dire." Pet. App. 6a.

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[2] The court also granted review of three other issues that are not involved in this petition. Pet. App. 7a-12a.

ARGUMENT

Petitioner claims that the Court of Military Appeals erred in finding that he knowingly and intelligently waived his right to counsel.

1. The Sixth Amendment does not require any specific procedures in the trial court to ensure that a defendant is sufficiently apprised of the risks of proceeding pro se. See *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988) ("[this Court has] taken a more pragmatic approach to the waiver question * * * to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized"); cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-347 (1980). In formulating a standard for a valid waiver of counsel, this Court has held that the court's only duty is to ensure that the choice is voluntarily made and that the decision is knowing and intelligent. *Faretta* v. *California*, 422 U.S. 806, 835 (1975); see also *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

A knowing and intelligent waiver of the right to counsel requires that the defendant somehow be made aware of the pitfalls awaiting him. "So long as the accused is made aware of the 'dangers and disadvantages of self-representation' " at trial, "his waiver of his Sixth Amendment right to counsel at [trial] is 'knowing and intelligent.' " *Patterson* v. *Illinois*, 487 U.S. at 299-300.[3] Exercising their super-

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[3] *Patterson* involved the right to assistance of counsel at postindictment questioning. The Court made clear, however, that this "pragmatic approach" to Sixth Amendment waiver questions applies to all criminal proceedings. A defendant who

visory powers to enable effective appellate review, cf. *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985); *Cuyler* v. *Sullivan*, 446 U.S. at 346 n.10, the courts of appeals have required the district courts to follow certain procedures to ensure that an adequate record is made in the district court of the defendant's being warned of the "dangers and disadvantages of self-representation." While those requirements vary somewhat depending on each court's judgment as to the procedures that will best facilitate appellate review, see *McDowell* v. *United States*, 484 U.S. 980 (1987) (White, J., dissenting from denial of certiorari), inter-circuit differences in matters of supervisory authority do not warrant plenary review by this Court. See *Thomas* v. *Arn*, 474 U.S. at 157 (Stevens, J., dissenting).

In any event, the Court of Military Appeals' decision dispelled any uncertainty on this score in the military courts, which operate separately from the federal courts of appeals. The Court of Military Appeals, in an exercise of its supervisory authority, set forth in an appendix to its opinion a comprehensive list of 17 questions for courts-martial to follow in future cases involving an accused's waiver of the right to counsel. Pet. App. 12a-14a.[4] The Court of

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is aware of the "dangers and disadvantages of self-representation" at the particular proceeding can knowingly waive the right to counsel at that proceeding. See 487 U.S. at 298.

[4] The court's colloquy is based on 1 *Bench Book for United States District Judges* §§ 1.02-2 to 1.02-5 (1991), an earlier version of which was cited with apparent approval by this Court in *Patterson* v. *Illinois*, 487 U.S. at 299 n.13. See also *United States* v. *McDowell*, 814 F.2d 245, 251-252 (6th Cir.)

Military Appeals is the highest court in the military justice system, *Burns* v. *Wilson*, 346 U.S. 137, 141 n.7 (1953), subject only to review in this Court by writ of certiorari. Its decisions are binding on lower military courts. *United States* v. *Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960); cf. Art. 76, UCMJ, 10 U.S.C. 876. The opinion in this case is thus controlling in every court-martial and court of military review in the military justice system.[5] Because the court primarily charged with overseeing the military justice system has adopted a uniform procedural rule for waiver of counsel at courts-martial, further review in this Court is not warranted.

2. Although no specific procedure is required in the trial court, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley* v. *Cochran*, 369 U.S. at 516; see also *Patterson* v. *Illinois*, 487 U.S. at 298 ("[a]n accused's waiver of his right to counsel is 'knowing' when he is made aware of [the usefulness of counsel and the dangers of proceeding without counsel]"). Petitioner mistakenly

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(adopting a similar set of questions for district courts within the Sixth Circuit), cert. denied, 484 U.S. 980 (1987); *United States* v. *Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.) (requiring a set colloquy for district courts within the D.C. Circuit), cert. denied, 459 U.S. 853 (1982).

[5] Petitioner's claim that the court failed to "provid[e] necessary guidance to the military Courts of Review," Pet. 9, is therefore incorrect. And petitioner is likewise incorrect in stating, Pet. 9, that different standards for waiver of counsel apply after the decision in this case depending upon the service in which the court-martial takes place.

suggests, Pet. 9-11, that the Court of Military Appeals erred in finding his waiver valid. To the contrary, the record in this case amply demonstrates a knowing and intelligent waiver of the right to counsel, as all three courts below found.[6]

After petitioner announced, "I don't want any lawyers," and stated unequivocally that he intended to defend himself, the trial judge told petitioner that he would be held to the standards of a lawyer, that he would have to have someone ask him questions if he desired to testify, and that petitioner would have to conduct voir dire himself. Pet. App. 25a. The judge told petitioner that Major Arnold and Captain Best would remain available to advise him on matters of law and procedure. Pet. App. 26a. Petitioner stated that he did not want Major Arnold and Captain Best to

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[6] The record also demonstrates that petitioner unequivocally and repeatedly rejected his appointed military counsel. See Gov't C.M.A. Br. 14-15; Pet. App. 26a ("I don't want [Major Arnold and Captain Best] anywhere around me."). The courts of appeals have consistently held that a defendant who fails to accept appointed counsel may be deemed to have waived the right to counsel. See, *e.g.*, *United States* v. *Fazzini*, 871 F.2d 635, 641-642 (7th Cir.) (defendant's refusal to cooperate with four successive appointed attorneys constituted waiver of right to counsel), cert. denied, 493 U.S. 982 (1989); *United States* v. *Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987) (defendant's persistent refusal to accept appointed counsel constituted implied waiver of right to counsel); *United States* v. *Schmitt*, 784 F.2d 880, 882 (8th Cir. 1986) (defendant's refusal to rely on appointed counsel constituted waiver of right to counsel); *United States* v. *Moore*, 706 F.2d 538, 538-540 (5th Cir.) (defendant's repeated rejection of appointed attorneys was a waiver of right to counsel), cert. denied, 464 U.S. 859 (1983).

advise him on such matters, and that he wanted a different lawyer to advise him. Pet. App. 26a-27a. The trial judge was careful to clarify petitioner's request to ensure that petitioner's desire was to have a different lawyer sit at his table to advise him on legal and procedural matters, rather than to have a different lawyer actually represent him. Petitioner reaffirmed his desire to represent himself. *Ibid.* The trial judge granted petitioner's request that Captain Lauer be assigned to advise him on matters of law and procedure. Gov't C.M.A. Br. 3.

The trial judge then instructed petitioner on the pitfalls and disadvantages of self-representation. The judge informed him that the government would be represented by, and would present its evidence through, an attorney. Pet. App. 27a. He warned petitioner that he was "facing potential confinement" if convicted. *Ibid.* He told petitioner that being represented by "a lawyer is the best way to defend yourself." *Ibid.* The judge also cautioned petitioner that, should he become disruptive, he would be removed from the courtroom and the trial would continue. Pet. App. 28a. The judge directed Major Arnold and Captain Best to remain in the courtroom throughout the trial, as they would be expected to assume the defense if petitioner became disruptive and was removed. See Gov't C.M.A. Br. 3 n.1.

After satisfying himself that petitioner's request to proceed pro se was knowing and intelligent, the judge granted the request. Pet. App. 29a ("I'm going to allow you to defend yourself, because you have that right."). The judge advised petitioner that if at any time he changed his mind concerning his decision to

represent himself, he should bring the matter to the judge's attention. Tr. 273. He also reminded petitioner that Major Arnold and Captain Best would be in the courtroom, keeping abreast of the case, in the event petitioner wished them to resume his defense. *Ibid.*

Immediately preceding voir dire of the court members, the trial judge engaged petitioner in the following colloquy, Tr. 287-288:

MJ [military judge]: Okay, is it still your desire to continue to represent yourself?

ACC [accused]: Uh-huh.

MJ: Do you understand what you are doing?

ACC: Yes.

MJ: Now, do you understand that you are going to have to address the court, and you are going to have to do the questioning rather than Captain Lauer?

ACC: Uh-huh.

MJ: You are sure you want to do that?

ACC: Yes.

MJ: Pardon?

ACC: Yes, sir.

MJ: Okay, so you—and you understand the pitfalls? In other words the dangers that you are running into?

ACC: Yes.

MJ: And you still want to continue forward on that course?

ACC: Yes.

There is no doubt on this record that petitioner knowingly and intelligently waived his right to the assistance of counsel, and that he did so cognizant of the risks involved. Each of the factors on which this Court relied in *Faretta* in concluding that Faretta himself was sufficiently aware of the dangers and disadvantages of self-representation is also present here. See 422 U.S. at 835-836. Before allowing petitioner to represent himself, the trial judge expressly informed him that he had the right to appointed counsel. The judge also made clear that petitioner would be required to follow applicable procedures. In addition, the judge repeatedly indicated to petitioner that he was making a mistake by proceeding pro se. The courts below were therefore correct in finding that petitioner made the decision to defend himself at trial "with [his] eyes open" in a manner consistent with *Faretta*. 422 U.S. at 835.

That conclusion is confirmed by "the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. at 464; see *Maynard* v. *Meachum*, 545 F.2d 273, 279 (1st Cir. 1976) (proper considerations "in determining whether the [defendant] understood what he was getting into" include the defendant's "involvement in previous criminal trials, his representation by counsel before trial, and the continued presence of advisory counsel

at trial"). Petitioner had previously been convicted in Kentucky state court on five counts of unlawful transactions with a minor. Tr. 915; GX 58. Petitioner fully participated, with the assistance of counsel, in the pretrial investigative hearing, at which he was able to familiarize himself with many of the practices and procedures that would later be used at his trial.[7] Petitioner had a military defense attorney by his side throughout his court-martial, upon whom he could (and did) rely for advice.

This Court has recognized that, although "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts[,] * * * [t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Faretta* v. *California*, 422 U.S. at 834. Petitioner repeatedly voiced his mistrust of lawyers. See Pet. App. 24a, 25a, 26a, 27a, 29a. Indeed, one of the crimes of which petitioner was convicted was destroying by fire the office building in which the staff judge advocate's office was located. See Gov't C.M.A. Br. 2-3, 4 n.2. The trial judge, by declining to "force a lawyer on [petitioner]," Pet. App. 23a, simply recognized petitioner's right to represent himself.

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[7] Art. 32, UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted in the civilian criminal justice system to determine whether there is probable cause to hold a defendant for trial. The accused, who has the right to be represented by counsel, is advised of the charges against him, has the opportunity to cross-examine witnesses, and can present evidence in his own behalf. See generally Rule for Courts-Martial 405.

See *Faretta* v. *California*, 422 U.S. at 820 ("To thrust counsel upon the accused, against his considered wish, * * * violates the logic of the [Sixth] Amendment.").

In sum, the record shows, and the courts below correctly concluded, that petitioner's decision to waive the assistance of counsel was knowing and intelligent. Petitioner's claim therefore warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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